MASTERSKILL (M) SDN BHD

v.

SISTEM TELEVISYEN MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[CIVIL SUIT NO: S-23-41-2010]
27 JUNE 2011

TORT: *Defamation - News broadcast - Visuals of plaintiff's campus shown on television in relation to issue of colleges failing to comply with conditions set by Ministry of Higher Education - Whether impugned words defamatory - Whether impugned words and accompanying visuals capable of referring to plaintiff - Whether reasonable people would be led to conclude that it referred to plaintiff - Whether defence of qualified privilege applicable*

TORT: *Defamation - Defences - Qualified privilege - Whether news broadcast of public interest - Whether there was responsible journalism - Whether defence of qualified privilege or Reynolds' public interest privilege availed defendant*

TORT: *Defamation - Damages - Assessment of damages - Factors considered - Whether claim of general damages for RM100 million misplaced - Whether RM200,000 sufficient in circumstances of case - Aggravated damages - Whether to be allowed*

The plaintiff owned and ran a nursing college, Masterskill College, at all material time. The defendant was a television broadcaster, owning the TV3 television network with wide and influential broadcast locally and internationally, and was also available online and accessible by internet users. The plaintiff was aggrieved by what was aired in the defendant's news bulletin on 13 March 2010 regarding the issue of colleges failing to comply with the conditions set out by the Ministry of Higher Education. The news broadcast was accompanied by a visual of the plaintiff's branch campus and obviously recognised by the plaintiff's students and parents. Some also had accessed the internet news portal of the defendant that was available for about a month after the news bulletin to watch the news item with the visuals of the plaintiff's college. The plaintiff felt that their good name had been tarnished and that a cause of action would lie in defamation against the plaintiff for damages and promptly filed an action. The plaintiff

pleaded in its statement of claim that the said words complained of were understood to mean, *inter alia*, that the plaintiff had been deregistered and had not provided the specified teaching infrastructures and equipment. The plaintiff prayed for general damages in the sum of RM100,000,000 and for aggravated damages to be assessed. The issues that arose for consideration were (i) whether the impugned words in the news bulletin coupled with the accompanying visuals and having regard to the language used be regarded as capable of referring to the plaintiff, (ii) whether the news bulletin would lead reasonable people who know the plaintiff to the conclusion that it referred to the plaintiff and (iii) whether the defence of qualified privilege applied in the circumstances of the case.

Held (allowing claim and awarding RM200,000 to the plaintiff):

(1) The impugned words were defamatory in the natural and ordinary sense of the words used and a reasonable man would understand the impugned words and visuals in a defamatory sense in that they did denote and connote the meaning as set out in the plaintiff's statement of claim if indeed they were not true of the plaintiff. The visuals to an ordinary viewer of even temperament, not having proclivity or a penchant for the sensational nor a craving for the curious but endowed with a fair measure of reasonableness and rational thinking would ordinarily have equated the news with the visuals of the college. Such a viewer would form the relation and nexus between the two, *ie,* the news and the visuals. A viewer in a relaxed mode is entitled to absorb a broadcast with the impugned words and visuals as a composite, coherent whole. It would ordinarily evoke a cause of concern as to which college it was that was being referred to in the visuals as being having its license revoked. Hence, the impugned words and the accompanying visuals taken together were capable of referring to the plaintiff. (paras 21, 28-30)

(2) Anyone including the plaintiff's international partners, who had logged on to the plaintiff's website would recognise the plaintiff's unique colour scheme, building interior, uniforms, badges and logos. It would be remiss for the defendant to suggest that the video was fleeting and that no one would have concentrated on the badges and name tags. It was a truism that the versatility of the internet allowed the viewer

to watch the clip over and over again, and it allowed for pause, zoom, enlargement and slow motion. Any potential student would do their best to verify which college was referred to in the visuals that had its license revoked and that had inadequate lecturers and facilities. Reasonable people who knew or were acquainted with the plaintiff would conclude that the impugned words and visuals referred to the plaintiff. (paras 44 & 45)

(3) The issue of colleges that had their license revoked is certainly a matter of public interest. However, the plaintiff which was duly approved, registered, licensed and certified by the Ministry of Higher Education, objected to being associated with colleges which were masquerading as duly licensed to conduct their diploma and degree programmes. Since the Deputy Minister had not listed out the private colleges that had their registration revoked, there should not be the slightest allusion to any college whatsoever during the news broadcast. Running the news without the visuals was another valid option seeing the risk of wrongful association especially when one does not know which college is in the blacklist. That was part of responsible journalism as envisaged in the test laid down in the Reynold's defence. (paras 50, 52 & 56)

(3a) In spite of a notice of demand dated 18 March 2010 sent to the defendant, the defendant's internet portal where the news was accessible was only removed around 13 April 2010, some one month after the news first broadcast on 13 March 2010. There was no public apology by the defendant other than the fact that it regretted that the report had been misinterpreted by parents. There was a clear reckless disregard as to the truth or otherwise of what had been published and the subsequent period when the news was still accessible. Appreciating the power of association with the first broadcast of the news on 13 March 2010 of the plaintiff to the news and the power of repeated access to the news to view and verify, the defendant's action or inaction in not removing the news report was not just regrettable and reckless but reprehensible. Based on the court's finding of fact, neither the defence of qualified privilege nor the Reynolds' public interest privilege availed the defendant. (paras 57 & 60-62).

(4) The plaintiff's claim for general damages of RM100 million was misplaced. The composite and crucial factors that this court must consider in assessing damages were *inter alia* (i) the reputation of the plaintiff, (ii) the sensitivity of the news report at the time of imminent listing in the Stock Exchange of Bursa Malaysia, (iii) the wide coverage as befitting a Bulletin Utama at 8pm, (iv) the hardship and humiliation caused and the agony, angst and anxiety arising out of the publication and the alarm the news report caused to the plaintiff's stakeholders and (v) the resulting damage to reputable and goodwill of the plaintiff. Thus, this court awarded the sum of RM200,000 which was sufficient in the circumstances of this case. The plaintiff did get listed in Bursa Malaysia under the name of Masterskill Education Group Berhad. None of the students who gave evidence left the college as a result of the news report. Reckless as the defendant might have been, this was not a case for the award of aggravated damages. (paras 64, 70-73)

Case(s) referred to:

Adam v. Ward [1917] AC 334 ***(refd)***

Ayob Saud v. T S Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Cassidy v. Daily Mirror [1929] All ER 117 ***(refd)***

Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***

Hill v. Church of Scientology of Toronto [1995] 2 SCR 1130 ***(refd)***

Horrocks v. Lowe [1975] AC 135 ***(refd)***

Hough v. London Express Newspaper Ltd [1942] KB 504 ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 CA ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Morgan v. Odhams Press Ltd [1971] 1 WLR 1239 ***(refd)***

Murugesan v. The Straits Times Press (1975) Ltd [1984-1985] SLR 334 ***(refd)***

Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd [2010] 7 CLJ 885 HC ***(refd)***

Too Good v. Spyring [1834] 1 CM & R 180 ***(refd)***

Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC ***(refd)***

For the plaintiff - R Jayasingam; M/s B H Lawrence & Co
For the defendant - Liew Teck Huat; M/s T H Liew & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] It is said that a picture is worth a thousand words! These days news broadcast in television is often accompanied by footages and videos (collectively called 'visuals') of what is being broadcast to enhance the news reporting and engage the viewing public.

[2] The juxtaposition of the news and the visuals may have the effect of causing the viewer to associate what is in the news with what is seen in the visuals. The effect especially if the news report is a negative one, can lead viewers to form a negative view of the subject matter shown in the visuals when the subject matter is not only capable of a generic representation of what was broadcast but also bearing a specific reference and a damaging one at that.

Parties

[3] The plaintiff owns and runs a nursing college called Masterskill College at all material time. It has campuses in Cheras, Ipoh, Kota Kinabalu and Kuching. The defendant carries on business of a television broadcaster. The defendant owns TV3 television network with wide and influential broadcast locally and internationally. TV3 is also available online and accessible by internet users.

Problem

[4] The plaintiff was aggrieved by what was aired in the defendant's main news bulletin called Bulletin Utama on 13 March 2010. The news as broadcast in its original language reads *inter alia*:

> Gagal mematuhi syarat Kementerian Pengajian Tinggi. Pendaftaran 60 kolej swasta dibatalkan. Tindakan itu dilaksanakan sejak 3 tahun lalu. Menurut Timbalan Perdana Menteri Pengajian Tinggi Datuk Saifuddin Abdullah ada diantara kolej terbabit gagal menyediakan pensyarah atau tenaga pengajar yang cukup. Selain tidak menyediakan prasarana dan peralatan pembelajaran yang telah ditetapkan. Tegasnya kementerian tidak akan bertolak ansur dengan mana-mana kolej yang melanggar syarat. Untuk itu permantauan menyeluruh akan dilaksanakan. Ketika ini terdapat lebih 300 kolej swasta berdaftar dan beroperasi di seluruh Negara.

In English the news would read:

> Failure to comply with the conditions set by the Ministry of Higher Education. The registration of 60 private colleges have been revoked. This action has been taken since 3 years ago. According to the Deputy Minister of Higher Education Datuk Saifuddin Abdullah there are colleges involved that had failed to provide enough lecturers and teaching staff. Besides that the failure to provide facilities and teaching aids that are sufficient. According to him the Ministry would not compromise with any colleges that had breached the conditions. A thorough assessment will be undertaken. At the moment there are about 300 registered private colleges operating in the whole country.

[5] There would have been no complaints if that was just what was carried in the news broadcast. However the news broadcast was accompanied by a visual of the plaintiff's branch campus and obviously recognized by the plaintiff's students and some of their parents. Friends and investors in the plaintiff that was at that time in the final stages of listing in the Kuala Lumpur Stock Exchange, also called and expressed their concerns.

[6] Some also accessed the internet news portal of the defendant that was available for about a month after the news bulletin to watch the news item with the visuals of the plaintiff's college.

[7] There was a flurry of activity in the plaintiff's campus the next day. Students expressed concerns as to whether their college was the one referred to as being without a proper license to operate. Angry parents called up and some threatened action. Damage control actions had to be immediately taken and meetings were held with students' representatives to address and allay the fears expressed. The plaintiff had to show to all and sundry affected by the news broadcast and especially the students, their parents and investors the evidence that the plaintiff was duly licensed to provide the courses that it was conducting.

[8] The news broadcast could not have happened at a worse time as the plaintiff was in the midst of finalising its paper work en route to listing in Bursa Malaysia. The plaintiff felt that their good name had been tarnished and that a cause of action would lie in defamation against the plaintiff for damages.

[9] It promptly filed the action on 12 April 2010.

Prayers

[10] It prayed for general damages in the sum of RM100,000,000.

[11] It also prayed for aggravated damages to be assessed and an injunction to restrain the defendant whether by their directors, servants or agents or otherwise howsoever, from further broadcasting and/or causing to be broadcast the words complained of or any prejudicial information concerning the plaintiff through any of the mass media businesses owned by the defendants and any such similar words defamatory of the plaintiff.

[12] It also prayed for interest and costs.

Principles And Parol Evidence

[13] It is clear without dispute that the plaintiff is not specifically referred to by name in the news bulletin. What the plaintiff is asserting is that by virtue of the video played in the background and accompanying the news, depicting the plaintiff's visible building, unique colour scheme, clear discernable faces of its students and staff and clear view of the plaintiff's badges, name tags and uniform, and facilities, the plaintiff is known to those who know the plaintiff by these discernable and distinguishing characteristics.

[14] The names of no college being mentioned, there is all the more speculation as to which colleges are in the blacklist and when there is only one college's visuals being broadcast, the natural inference is that, that is the college that the news item had reference to.

[15] The plaintiff pleaded by para. 8 of its statement of claim that:

> In their natural and ordinary meaning, the said words complained of, concerning the plaintiff, meant and were understood to mean and/or by way of innuendo and/or by reference that:
>
> 1. The plaintiff has failed to meet the requirements/conditions set by the Ministry of Higher Education;
>
> 2. Masterskill College has been deregistered;
>
> 3. The management of Masterskill College has not since the past 3 years complied with the requirements set/conditions imposed;

A

4. Masterskill College had failed to provide adequate number of lecturer or tutors;

5. Masterskill College has not provided the specified teaching infrastructures and equipment;

B

6. Masterskill College is in breach of the requirements set/ conditions imposed;

7. By reasons of the above, Masterskill College is being monitored by the Ministry of Higher Education.

C **[16]** Section 2 of the Defamation Act 1957 defines "words" to include pictures and visual images as well.

Whether The Impugned Words Used Are Defamatory?

D **[17]** The test involved in determining whether or not the words complained of are defamatory is a two-stage process. First, it must be considered what meaning the words would convey to an ordinary person. Once this has been established, secondly it must be considered whether under the circumstances in which the words were published, the reasonable man would be likely to

E understand them in a defamatory sense. The test whether the words are capable of conveying a defamatory meaning is a question of law calling for a decision of the court.

[18] These have been applied in many cases and I need only to

F cite *Ayob Saud v. T S Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 at p. 324.

[19] The elements to be proved and the burden on the respective parties are succinctly set out in *Ayob Saud*'s case (*supra*)

G at p. 324 as follows:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege

H is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof,

I communication made under qualified privilege could no longer be regarded as privileged. (*Rajagopal v. Rajam* [1972] 1 MLJ 45.)

[20] As to whether the impugned words are defamatory, his Lordship Mohamed Dzaiddin J (as his Lordship was then) applied the oft-quoted text as follows at pp. 324-325:

> To be defamatory the imputation need have no actual effect on the person's reputation; the law looks only to its tendency. (*Gatley on Libel and Slander*, 6th Edn., p. 14, para. 31). On this issue, the first point to consider is whether the words complained of in their natural and ordinary meaning are defamatory of the plaintiff. The Judicial Committee of the Privy Council in *Jones v. Skelton* [1963] 1 WLR 1362 stated the law as follows:
>
> It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court ... In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained forced or utterly unreasonable interpretation. In *Capital and Countries Bank v. George Henry & Son*, Lord Selborne LC said:
>
> > The test, according to the authorities is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libelous sense.
>
> The ordinary and natural meaning of it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words. See *Lewis v. Daily Telegraph Ltd*. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

[21] I have no doubt that the impugned words are defamatory in the natural and ordinary sense of the words used and that a reasonable man would understand the impugned words and visuals in a defamatory sense in that they do denote and connote the meaning set out in para. 8 of the statement of claim if indeed they are not true of the plaintiff.

A **Whether The Impugned Words And Visuals Have The Effect Of Referring To The Plaintiff?**

[22] The plaintiff was not expressly referred to in the news broadcast. However it is not disputed that the visuals shown is B that of the plaintiff's branch campus in Kota Kinabalu. Indeed it was part of a paid advertisement that the plaintiff had recently engaged the defendant to do on its college with respect to the plaintiff's branch campus. It was in conjunction with the official ceremony of the launch of the branch campus in Kota Kinabalu C on 27 February 2009. The question is whether the words used could reasonably be understood to refer to the plaintiff. The test with respect to whether the words used could refer to the plaintiff has been propounded by the House of Lords in *Knupffer v. London Express Newspaper Ltd.* [1944] AC 116 at p. 121 where Viscount D Simon LC applied a two-stage test as follows:

> There are two questions involved in the attempt to identify the appellant as the person defamed. *The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of* E *fact - Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?* Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as F governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative. I move that this appeal be dismissed. (emphasis added)

Earlier at p. 119 it was also expressed by Viscount Simon LC that:

G

> Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as **would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.** (emphasis added)

H

[23] In the *Knupffer*'s case itself, it was held that the words in the article were not reasonably capable of referring to the plaintiff. As such, no question of considering the evidence arose. As a result, even the evidence given by four witnesses who positively I identified the plaintiff as the person referred to in the article was not given any regard by the court to link the article to the plaintiff.

[24] I bear in mind the salutary caution expressed by Viscount Simon LC in the *Knupffer*'s case at p. 121: A

> Witnesses called for appellant were asked the carefully framed question: 'To whom did your mind go when you read the article?' and they not unnaturally replied by pointing to the appellant himself, but that is because they happened to know the appellant as the leading member of the society in this country and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual. B

[25] In *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268, his Lordship RK Nathan J on the issue of identification observed as follows at p. 275: C

> The words complained of do not expressly refer to the plaintiff; yet it is the law that the burden remains on the plaintiff to show that they refer to him (See *Lee Kuan Yew v. Davies & Ors* [1989] SLR 1063 and *Institute of Commercial Management United Kingdom v. News Straits Times Press (M) Berhad* [1993] 2 CLJ 365). **It is for the Plaintiff to establish objectively that he was the person to be identified by the words used.** (emphasis added) D

[26] Lord Guest in his minority judgment in the House of Lords decision in *Morgan v. Odhams Press Ltd* [1971] 1 WLR 1239 expressed the test of identity in the following passage at p. 1261: E

> ... But here the question is not whether the words are defamatory. It is conceded that they are, if they refer to the plaintiff. The question is one purely of identity. 'Are the words capable of being understood to refer to the plaintiff?' In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say 'I wonder if the article refers to Johnny Morgan' nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff. F G H

[27] Applying the first question which is a question of law as propounded in the *Knupffer*'s case and modifying it as the circumstance of the present case would require, the question would be: I

> Can the impugned words in the news bulletin coupled with the accompanying visuals and having regard to the language used, be regarded as capable of referring to the plaintiff?

[28] I would say the answer is 'Yes'. The visuals to an ordinary viewer of even temperament, not having a proclivity or a penchant for the sensational nor a craving for the curious but endowed with a fair measure of reasonableness and rational thinking would ordinarily have equated the news with the visuals of the college. Such a viewer would form the relation and nexus between the two: the news and the visuals. Why put the two together, unless they have a relation one to the other. Surely visuals are there not to fill a void which otherwise would be an uncomfortable silence but to enhance the message and engage the viewer further.

[29] Learned counsel for the defendant Mr. T H Liew sought to suggest that if one were to look at the timing of the visuals it came in more towards the end of the news bearing the impugned words and more into the point where the Honourable Deputy Minister of Higher Education was referring to the fact that there were more than 300 registered private colleges operating in the whole country. However one cannot impute to the ordinary viewer a fine discernment of the timing of the visuals *vis a vis* the differentiated parts and portions of a news item. A viewer in a relaxed mode is entitled to absorb a broadcast with the impugned words and visuals as a composite, coherent whole. It would ordinarily evoke a cause of concern as to which college it is that is being referred to in the visuals as being having its license revoked.

[30] I hold that objectively and as a matter of law, the impugned words and the accompanying visuals taken together are capable of referring to the plaintiff.

[31] I next proceed to ask the second question in the test propounded in *Knupffer*'s case (*supra*) which is a question of fact:

> Does the news bulletin having regard to the impugned words and the accompanying visuals, in fact, lead reasonable people, who know the plaintiff, to the conclusion that it does refer to the plaintiff?

[32] Here, it is of course true that not all who watched and heard the news would know that the college shown in the visuals is that of the plaintiff. However, that is not the test. The test is whether reasonable people who know or are acquainted with the plaintiff would conclude that it does refer to the plaintiff. There is more than sufficient evidence pointing in this direction.

[33] There is the evidence of PW1 Ravi a/l Kandasamy who followed his niece to the plaintiff's Masterskill College when she made inquiries about the college. He saw the defendant's news report and recognised the place to be Masterskill College. He recognised the colour scheme, the students' uniform, name tags and badges. After watching the news he said in court that he really thought that Masterskill College did not have the proper college certification. He testified as follows:

> From the news report, I understood that Masterskill's registration or license had been revoked for failure to comply with rules and regulations and that they had poor facilities and inadequate teaching staff. I was very sure that TV3 referred to Masterskill. I was shocked to hear and didn't have doubts because it was stated by a leading TV station.

[34] The students whose faces could be recognised also gave evidence. They are PW3 Rex Shamree Amiro Azree, PW4 Rosmah binti Mohd Rosli, PW5 Joel Abby Gubud, PW6 Helorina binti Galiwas and PW7 Kasim Mudin bin Werlis. They confirmed that the video had been shot in the Kota Kinabalu Masterskill College campus and the different places in the College shown in the video. Following the news, they thought that Masterskill College had no proper certification. Classmates came to them asking if Masterskill College had the proper license to their courses. Their relatives, friends and parents also called them asking if Masterskill College was duly licensed. Some of the students were concerned that their studies would be interrupted.

[35] The next batch of witnesses were PW8 Sylvia binti Naikol, PW9 Tricia Simson, PW10 Mohd Mukhriz bin Azamain, PW11 Yuliana binti Daisong, PW12 Siti Fatimah binti Mohd Tajib and PW13 Adal Anak Adong who are all students of the Masterskill College. Their evidence was that they watched the news either on television or the internet and thought that Masterskill College did not have the proper certification. They recognised the video clip of the college. Their relatives and friends came asking and they doubted if Masterskill had the necessary certification. They also testified that they received complaints from fellow classmates and college mates as they were student leaders in the College.

[36] Indeed PW11, being the Secretary of the Student Council informed the court in her evidence that the news report had a disappointing and chaotic effect on the students in the campus. All her friends rebelled and regretted having registered and paid the

College fees. They felt cheated. The lecturers when asked could not confirm the news and there was no lecture on the Monday after the news report.

[37] PW13 was the President of the Student Council at that time. He said that he received about 100 complaints as the President of the Student Council asking for confirmation on the veracity of the news. The students not only felt cheated by the College but they also lost confidence in the College. A emergency meeting was called with all the student representatives and it was after listening to the explanation of the management of the College that they were satisfied that there was no truth in the news report with respect to the plaintiff's Masterskill College.

[38] PW3, Victor bin Sylvester, is the Regional Centre manager for the College for Kota Kinabalu and Kuching campus testified that all those who watched the launch of the Kota Kinabalu's branch campus in the paid advertisement over TV3 would recognize the College as the defendant had used the exact same footage as was used in the launch. He added that everyone entering the college has to use the same staircase shown in the visuals as there was no elevator at the campus. He explained that the college's website also has videos and photographs of the college and that the unique orange colour that the plaintiff used widely on all the buildings and the inside thereof would be clearly recognizable by all who have been to that campus during the open day.

[39] I have no good reason to disbelieve the students who came to testify on behalf of the plaintiff. The students are stakeholders of the plaintiff and have a right to testify on how they felt as a result of the news broadcast and the visuals. They were all subject to rigorous cross-examination by the defendant's counsel but remain substantially unscathed.

[40] Though the plaintiff had called no fewer than 11 students from their Kota Kinabalu campus to testify, I am conscious of the observation made by the court in *Hough v. London Express Newspaper Ltd* [1942] KB 504, which was cited with approval in *Murugesan v. The Straits Times Press* (1975) Ltd [1984-1985] SLR 334 at p. 337 para. F:

> It is not proof of a special fact in this sense merely to call a number of people to say that they understood the words in a defamatory sense; they would have to prove some fact known to them which would be sufficient to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense.

[41] That is not of course to say that the plaintiff has nothing to achieve by calling witnesses to testify subjectively to what appears to be an objective finding of fact as to whether the impugned words and visuals did refer to the plaintiff. I would follow the wisdom expressed in the words of her Ladyship Heliliah Mohd Yusof J (as she then was) in *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559 at p. 577:

> As used here extrinsic facts go to show that a given statement considered to be defamatory refers to the plaintiff who is bringing the action. If the final element is an objective one I do not think that in every case the plaintiff will need to produce witnesses who will actually testify that they felt the article referred to him. It will of course be much better if the plaintiff can produce such witnesses.

[42] Indeed the facts of *Wong Yoke Kong*'s case are not too dissimilar to the present case with respect to the non-direct reference to the identity of the plaintiff there. The brief facts appear at pp. 101-102 as follows:

> On 13 October 1994 the Bar Council was informed that the fourth plaintiff had been appointed as resident branch partner of the branch office of Messrs Nazri Aziz & Wong. In a letter dated 18 May 1995 the firm of Nazri Aziz & Wong informed the Bar Council that Dato' Seri Nazri Aziz had been appointed then as the Deputy Minister in the Prime Minister's Department on 8 May 1995, and had therefore stopped practice and left the partnership of Messrs Nazri Aziz & Wong. Although Dato' Seri Nazri Aziz had ceased his legal practice and partnership in Messrs Nazri Aziz & Wong on 18 May 1995, the remaining partners (ie all the plaintiffs) continued with the partnership of the firm under the same name of Nazri Aziz & Wong as stipulated in the deeds of partnership. The article as mentioned above was found in the 1 January 1996 issue of the Malay Mail. The specific parts of the article relevant for the present action are as follows:
>
> > Datuk Nazri Aziz: Last year, he led the Umno Youth charge that rejected Rahim's leadership and then claimed he was insulted when he felt the Umno leadership did not respect the movement's wishes.

> He spat out some pretty unbecoming words against the Umno leadership, especially on El Presidente, but had to gobble them back and apologized publicly.
>
> Now, in a turnaround, he wants to give the Youth leader post back to Rahim on a silver platter. **Hope his law firm is doing decent business** ... (emphasis added.)

It is the contention of the plaintiffs that the 'law firm' referred to in the said article can only refer to Messrs Nazri Aziz & Wong and no other. The plaintiffs therefore contend that that article which was published barely seven months after Datuk Seri Nazri Aziz ceased practice and had left the partnership there appeared to be no other law firm which carries the name Nazri Aziz in its name.

The case for the defendants in general is that the plaintiffs must prove that an ordinary reader reading the article would reasonably come to the conclusion that whatever allegedly offensive sentence that is incorporated in that article refers to the plaintiffs. It is also the defendant's case that the plaintiffs were never identified in the article and/or the allegedly offensive passage and sentence since at the time of the publication of the article Datuk Seri Aziz was also no longer practicing as a lawyer. Before embarking on the position of the law it is necessary to note the parts of the statement which are alleged to be defamatory of the plaintiffs again as follows:

> ... Hope his law firm is doing decent business ...

[43] In *Wong Yoke Kong*'s case (*supra*), it is of course true that not all would know of the legal firm of Messrs Nazri Aziz & Wong and much less the name of the partners of the firm after Dato' Nazri Aziz left the firm. However those who know and are acquainted with the plaintiffs would have no difficulty in knowing that the plaintiffs were being referred to by the words used. Her Ladyship in holding that reasonable persons acquainted with the plaintiffs on reading the article would come to the conclusion that the impugned words referred to the plaintiffs quoted a passage from Scrutton LJ in *Cassidy v. Daily Mirror* [1929] All ER 117 at p. 341:

> ... In my view, since *E Hulton & Co v. Jones* [1910] AC 20, it is impossible for the person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning in regard to A, to defend himself by saying: 'I never heard of A and did not mean to injure him'. If he publishes words reasonably capable of being read as relating directly or indirectly to A and,

> to those who know the facts about A, capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words.

[44] I agree with learned counsel for the plaintiff, Mr. R Jayasingam, that anyone including the plaintiff's international partners, who has logged on to the plaintiff's website would recognise the plaintiff's unique colour scheme, building interior, uniforms, badges and logos. It would be remiss for the defendant to suggest that the video was fleeting and that no one would have concentrated on the badges and name tags. It is a truism that the versatility of the internet allows the viewer to watch the clip over and over again, and it allows for pause, zoom, enlargement, slow motion to mention a few. I agree that any potential student would do their best to verify which college was referred to in the visuals that had its license revoked and that had inadequate lecturers and facilities.

[45] Having regard to the principles as enunciated by the cases referred to above and applying it to the facts of this case, I am more that satisfied that reasonable people who know or are acquainted with the plaintiff would conclude that the impugned words and visuals do refer to the plaintiff.

Whether The Defence Of Qualified Privilege Applies In The Circumstances Of The Case?

[46] The *locus classicus* of this defence is the case of *Adam v. Ward* [1917] AC 334 at p. 334:

> A privilege occasion is an occasion where the person who makes the communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[47] Perhaps its genesis is traceable to the case of *Too Good v. Spyring* [1834] 1 CM & R 180 where Parke B said at p. 194, *inter alia*:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another … and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which

A the laws draw unauthorized communication, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted making them within any narrow limits.

B

[48] His Lordship Mohd Zawawi Salleh J in the case of *Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885 at pp. 900-901 referred to recent developments in the defence of qualified privilege by referring to the case of *Edward*

C *Seaga v. Leslie Harper*, Privy Council Appeal No. 90 of 2006, [2008] UKPC 9 where Lord Carswell opined:

The submission has been advanced from time to time the law should recognize the existence of a species of qualified privilege

D founded upon a duty on the part of the maker of the statement to publish it to the world at large. This received some support from Pearson J in *Webb v. Times Publishing Co. Ltd* [1960] 1 QB 535, 568 and from Cantley J in *London Artist Limited v. Littler* [1968] WLR 607, 619 but in *Blackshow v. Lord* [1984] QB 1, the Court of Appeal was cautious in accepting it as a general rule

E while being prepared to acknowledge the existence of occasional exceptions… the germ of the idea of a privilege for reports to a wide range of readers or listeners where the circumstance warrant a finding of sufficient general public interest may however be seen in *Blackshaw v. Lord*, a decision which merits more attention than

F it has hitherto received. To recognise such statements should be made, notwithstanding the risk that they may be defamatory of the subjects of the statements. Nevertheless, although attempts were made to move the law in this direction, it could not be said until the decision of the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 that a defence on these lines was

G available to those who published defamatory statements to the world at large.

[49] As observed by his Lordship Mohd Zawawi Salleh in *Sivabalan*'s case at pp. 906-907:

H The *Reynolds* principle was considered and applied by the High Court in the case of *Tan Sri Dato' Tan Kok Ping v. The New Straits Times* [2010] 3 CLJ 614. For myself, I would hold that this new defence is available to the defendants. I think we need to move with the times and we also need to view the situation

I with today's eyes. A number of countries with common law traditions comparable to those of Malaysia have moved in recent years to modify the law of defamation to provide greater

> protection for communication on matters of public interest. The *Reynold's* privilege represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Malaysian society. It is clear that the law has begun to shift in favour of broader defences for press defendants most prominently in England and Canada but also in Australia.

[50] Learned counsel for the defendant Mr T H Liew submitted that under the *Reynold*'s Defence, once it is established that the media acted on a matter of public interest then the next question is whether the media has acted reasonably in publishing the material or what is commonly referred to as responsible journalism. No one is disputing that the issue of colleges that had their license revoked is certainly a matter of public interest. What is being disputed is whether the manner in which the news is being reported with the accompanying visuals can be said to be responsible journalism.

[51] In this regard, the court will consider (where applicable), various factors. The House of Lords in *Reynold*'s case (*supra*) speaking through Lord Nicholls of Birkenhead listed the matters as follows at p. 205:

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The information may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained in the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable *corpus* of case law will be built up.

[52] Let us now examine the factors above - stated to the facts in the present case. There is no doubt that the subject matter is a most important one. Parents work hard to save enough money to ensure that their children get a credible degree or diploma that is recognised at least locally. No one is saying that the media should not report on that. What is being objected to by the plaintiff is this: by all means expose those who have short-changed the students and masquerading as duly licensed to conduct their diploma or degree programmes in the college but not to associate us with them because we are duly approved, registered, licensed and certified by the Ministry of Higher Education. DW1, Rozairen binti Ibrahim, the Executive Producer of the Defendant testified that the source of the news is from the National News Agency or Bernama in short. No one doubts that the source is reliable and credible. However the Deputy Minister in question had not listed out the 60 private colleges that already had their registration revoked. Hence all the more reason that when the news is broadcast, there should not be the slightest allusion to any college whatsoever unless the defendant had the inside story that a certain college is in the revoked list. Important as the list of revoked colleges is, equally important if not more important, is to allow the public to wrongly associate a college that is not on the blacklist, as one that is, because the visuals of the college and the only one at that, had been shown for the news on Bulletin Utama on 13 March 2010 and subsequently for about a month in the defendant's news website. Nothing was done to verify with the plaintiff if it was in the blacklist alluded to by the Deputy Minister.

[53] DW2, Encik Kamaruddin Mape, the Deputy News Editor of the defendant told the court that he had used the Bernama script word-for-word and that his instruction to the Visuals Editor was that the visuals should not show any name or logo of any school or college because this was a general report on an important issue relating to education and not one referring to any college in particular.

[54] DW3, Encik Ahmad Bosran bin Ibrahim, the Visuals Editor for news production of the defendant informed the court that he was responsible for inserting the visual images into the news programme. He explained that he would have to go through the scripts carefully so that when he inserted the visuals, **they would correspond with the stories as read out** by the newscaster according to the script. (emphasis added) He further added that the visuals must synchronise precisely with the scripts.

[55] I am sure DW3 would have realised that the concept of correspondence and synchronisation would create in the mind of the viewers the relation between the news and the subject matter of the college under discussion such that the news speaks of the college that is shown and that college bears a relation to the news being read. Even if a viewer is not sure he would still be harbouring a doubt and when in doubt, it is better to avoid the college in question.

[56] Surely DW3 could have shown a visual of the Deputy Minister giving the interview or interview with concerned parents. It was also put to the witness that there are many options available in visuals of this nature and they include digitalizing the faces, changing the colour code or splicing of many different colleges in quick succession. Running the news without the visuals is still another valid option seeing the risk of wrongful association especially when one does not know which college is in the blacklist. I would say that that is part of responsible journalism as envisaged in the test laid down in the Reynold's defence.

[57] I further take into consideration that in spite of a notice of demand dated 18 March 2010 sent to the defendant, the defendant's internet portal where the news was accessible was only removed around 13 April 2010, some one month after the news was first broadcast on 13 March 2010. This fact has not been denied by the defendant's witnesses and the fact of the internet accessibility that was available was also not denied by the defendant. There was no public apology by the defendant other than the fact that it regretted that the report had been misinterpreted by parents. There was a clear reckless disregard as to the truth or otherwise of what had been published on 13 March 2010 and the subsequent one month period when the news was still accessible.

[58] The plaintiff had by para. 7 of its statement of claim pleaded that:

> The said words complained of were authored by the defendants and published/broadcast by the defendants *vis* television nationwide as well as worldwide through the internet.

[59] In response the defendant by para. 5 of its defence pleaded:

> 5. As regards para. 7 of the Statement of Claim:
>
> 5.1 The defendant admits that the Report and the Words were aired on their TV3 channel and was accessible on their website.
>
> 5.2 Insofar as the Report and the Words were accessed outside Malaysia, this is irrelevant to the present action which, as a matter of law, is confined to publication in Malaysia.
>
> Except for the above, para. 7 of the Statement of Claim is denied.

[60] The defendant was not denying that the website was accessed at least from Malaysia for the period when the news was accessible for about a month. In any event the nature of Internet accessibility is that it immediately gives the broadcaster a global reach with the report being accessible from anyplace and anytime with a click.

[61] Appreciating the power of association with the first broadcast of the news on 13 March 2010 of the plaintiff to the news and the power of repeated access to the news to view and verify, the defendant's action or inaction in not removing the news report is not just regrettable and reckless but reprehensible and in the words of Lord Diplock in the House of Lords case of *Horrocks v. Lowe* [1975] AC 135 at p. 151 "treated as if he knew it to be false." His Lordship observed at pp. 149-150 as follows:

> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally thought tautologously termed, "honest belief." *If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of law, treated as if he knew it to be false* …
>
> … Judges and juries should, however, be *very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity.* (emphasis added)

[62] Based on my finding of fact, I hold that neither the defence of qualified privilege not the Reynolds' public interest privilege avails the defendant.

Assessment Of Damages

[63] There was a time when millions of ringgit in damages was in vogue, reaching its pinnacle perhaps in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals* [1995] 2 CLJ 912. Subsequent cases have reversed the trend and it takes as much courage as humility to admit that "the time has come when we should check the trend set by that case (*MGG Pillai*'s case). This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory." (as per his Lordship Gopal Sri Ram JCA (as he then was) in *MGG Pillai*'s case at p. 395).

[64] There are some other vestiges of the past that we must leave behind. The plaintiff's claim for general damages of RM100 million is misplaced and I hope it is not a scramble to get into the Malaysian Guinness Book of Record for the highest claim made. Lawyers create for their clients unnecessary sensation by setting a sum for the general damages. The time has come for general damages to be left as it is – general and not quantified for it is not special damages! There is no cogent reason for departing from the general principle that is applicable to all claims for general damages in that it is not quantified and lawyers do well to advise their clients that. It is left to the court to assess and the court is uninfluenced by the quantum that the plaintiff has stated or as is stated, the upper limit that the plaintiff has set. If at all the greater the gulf between the amount claimed and the amount awarded, the lesser will be the costs given. This will in some way discourage

A the practice of so called setting an upper limit to a quantified claim for general damages which has the effect of only sensationalising the claim.

[65] I take into account the evidence of PW3 Victor Sylvester
B that he received a phone call on the same night of the news on 13 March 2010 from a person claiming to be a parent of a student of the College and shouting, "Don't play with us … kau ingat orang Sabah ini bodoh kah? … Ingat siapa bayar gaji kau?" The caller threatened to lodge a police report against the College
C too.

[66] I have noted the testimony of PW14 Miss Tanaletchimy Rajaratnam, the Senior Manager of Quality Management of the plaintiff, that the Ministry of Higher Education has registered
D Masterskill College of Nursing and Health as a Private Higher Education Institution in December 2004 and that the Kota Kinabalu's campus received its registration to operate on 6 March 2008 until 5 March 2013 (five years). I noted that in July 2008 the Plaintiff received the ministry's approval for the establishment
E of the Masterskill University College of Health Sciences. PW14 also testified that the defendant did not offer any apology and did not offer to retract what they had done or published or broadcast a report that it had been mistakenly depicted in the news.

[67] PW15 Mr See Thiong Chai, the Chief Financial Officer of
F the plaintiff made reference to the plaintiff's prospectus prepared in conjunction with the listing exercise of the plaintiff and the final listing approval from the Securities Commission was dated 24 March 2010. He said that the plaintiff could not have obtained approval if its registration had been revoked by the Ministry
G concerned. He informed the court that its intake for April 2010 was unbelievably low as its numbers have been steadily increasing every year since it received ISO certification and University status. He also related the fact that the college received numerous complaints from members of the public and families of the
H students. On top of that they received numerous queries from investors and potential investors especially in view of their imminent listing. The CEO of the plaintiff, PW16 Dato' Seri Santhara Kumar a/l Ramanaidu, testified that licensing was fundamental to the plaintiff's operation and business. He said that
I he had a tough time trying to convince its distinguished board of directors, chancellor and the investors and potential investors that the TV3 news was wrong. He said the task of convincing the

potential investors was made more difficult as the online access to the news was available for a month after the first broadcast on 13 March 2010. What was worse according to the CEO was the fact that its competitors during their roadshows were playing the news clip; capitalising on it and attempting to put it in a bad light.

[68] PW16 also lamented the fact that previously there was a report in relation to PTPTN loan that was reported by the defendant or its other company, Media Prima. Later when it was clear that the plaintiff was not involved in the scholarship scandal, the defendant did not run the true story. There was also a press release regarding an alleged rape of a student in its hostel and when the case was struck out, that too was not published.

[69] The General Manager of the plaintiff, PW17 Mr Gabriel Bartolome, testified that the plaintiff allocated about RM10.8 million towards advertisement, promotional and publicity needs annually. The prospectus of the plaintiff bore testimony to this at pp. 146-148 in the plaintiff's Second Supplementary Bundle of Documents. He informed the court that after the news report the plaintiff had spent a further RM2 million to counter the ill effects as it was only seven weeks away from its listing. He explained that it was also a bad time as several students intakes were under way in April and May 2010. The SPM/STPM results had just been announced and that it was a crucial time for student enrolment. He also emphasized that the plaintiff provided a further RM1 million scholarship which it announced on 25 March 2010 during the ground breaking ceremony of its Kota Kinabalu campus Phase II.

[70] I must observe here that assessment of damages for defamation is unlike assessment of damages for the tort of negligence for instance or the test for assessing damages for breach of contract. It is not how many students you claimed to have lost arising out of the news report or the further advertising and promotional spending you embarked on to shore up what had been eroded by the news report. It is finally an assessment by the court based on the following:

1. the reputation of the plaintiff;
2. the nature of business that the plaintiff is in;
3. the sensitivity of the news report at the time of imminent listing in the Stock Exchange of Bursa Malaysia;

4. the wide coverage as befitting a Bulletin Utama at 8pm;

5. the lack of a clear and unreserved apology;

6. the inaction in removing the internet news online;

7. the remedial actions taken by the Defendant as in 'damage control';

8. the hassle, hardship and humiliation caused, the degree of distress and disturbance experienced;

9. the agony, angst and anxiety arising out of the publication and the alarm the news report caused to the plaintiff's stakeholders; and

10. the resulting damage to reputable and goodwill of the plaintiff.

[71] These are the composite and crucial factors, by no means comprehensive and complete, that this court must consider in assessing damages.

Pronouncement

[72] Having regard to what is the more recent awards of damages and bearing in mind that no two cases and even similar ones will not be on all fours I awarded a sum of RM200,000 which I am confident will be sufficient in the circumstances of this case. The plaintiff did go ahead and is now listed in Bursa Malaysia under the name of Masterskill Education Group Berhad. None of the students who gave evidence left the College as a result of the news report. Any extra expenditure on advertising and promotion as well as scholarship grants would all contribute to enhancing the goodwill and good name of the College.

[73] Reckless as the defendant might have been, this is not a case for the award of aggravated damages. In *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130, Cory J, who delivered the judgment of the court said:

> Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the

plaintiff, either by spreading further a field the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.

[74] That approach found acceptance in the Court of Appeal case of *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 at p. 396. I would adopt the same approach.

[75] I also awarded interest at 8% per annum from the date of writ 12 April 2010 to date of realization and costs of RM50,000 to the plaintiff.

[76] For completeness, I also record the defendant's undertaking to the court that it would not cause to be broadcast again the same news with the same visuals through any of the mass media owned by the defendant or such similar words that are defamatory of the plaintiff.

Postscript

[77] It is said that we know the price of everything but the value of none. How true that is when we seek to put a price to reflect the value of a person's reputation. Indeed a good name is more desirable than great riches; to be esteemed is better than silver or gold.